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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

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9 Olen Properties Corporation, *et al.*,

10 Plaintiffs,

11 v.

12 Jefferson at One Scottsdale I LP, *et al.*,

13 Defendants.

14

No. CV-24-02423-PHX-JJT

ORDER

15 At issue is Plaintiffs' Motion to Remand (Doc. 9, Mot.), to which Defendant Uponor
16 Inc. (Uponor) filed a Response (Doc. 15, Resp.) and Plaintiffs filed a Reply (Doc. 16,
17 Reply). For the following reasons, the Court grants Plaintiffs' Motion.

18 **I. BACKGROUND**

19 One North Scottsdale (the Apartments) is a multifamily apartment complex in
20 Scottsdale, Arizona, managed by Plaintiff Olen Properties Corp., a Florida corporation,
21 and owned by Plaintiff One North Scottsdale Corp., an Arizona corporation. Defendant JPI
22 Construction, LLC (JPI), a general contractor based in Texas, allegedly completed
23 construction on the Apartments in July 2014. In early 2022, Plaintiffs discovered that the
24 Apartments suffered from widespread leaks in PEX pipe and plumbing components
25 allegedly manufactured by Defendant Uponor, Inc., an Illinois corporation.

26 Plaintiffs originally filed suit in Maricopa County Superior Court on January 20,
27 2023. (Mot. at 2.) Plaintiffs' first amended complaint, filed on April 14, 2023, alleges
28 claims of negligence, negligent misrepresentation, strict products liability, and breaches of

1 express and implied warranties. (Mot. at 3.) On May 19, 2023, Uponor filed a notice of
2 removal to the U.S. District Court for the District of Arizona, which had diversity
3 jurisdiction under 28 U.S.C. § 1332(a).

4 Shortly thereafter, the parties agreed to early mediation and jointly stipulated to stay
5 litigation until October 4, 2023. (Mot. at 3.) On September 22, 2023, Plaintiffs learned
6 through mediation that JPI was not physically involved in the construction of the
7 Apartments and that JPI had subcontracted the plumbing work to Danco Plumbing, Inc.
8 (Danco), an Arizona corporation. (Doc. 1, Ex. C. at 2.) Plaintiffs subsequently dismissed
9 JPI on October 5, 2023. After consulting with one of their experts, Scott Freisen, who
10 determined that the plumbing installation could have contributed to the leaks, Plaintiffs
11 filed a second amended complaint (SAC) on November 10, 2023 naming Danco as a
12 defendant. (Mot. at 4.) Because complete diversity no longer existed between the parties,
13 the case was remanded back to Maricopa County Superior Court on December 1, 2023.

14 After being served on December 27, 2023, Danco filed a notice of appearance on
15 February 26, 2024. Over the following months, Plaintiffs “worked with Danco’s counsel
16 to determine [that] Uponor had trained its installers in accordance with the requirements of
17 Uponor’s warranty.” (Mot. at 6.) During this period, ongoing testing by Plaintiffs’ experts
18 also suggested that the PEX pipes were “inherently defective and would fail regardless of
19 the installation performed by Danco.” (Reply at 2.) Based on these findings, “Plaintiffs
20 determined that the claims against Danco were of minor significance compared to the
21 claims against Uponor” and that “the claims would add unnecessary cost and complexity
22 to the case.” (Reply at 3.) Plaintiffs thus dismissed Danco on September 5, 2024; and, as
23 diversity was now reestablished, Uponor removed the case back to the U.S. District Court
24 for the District of Arizona on September 13, 2024. (Doc. 1, Notice of Removal.)

25 On October 11, 2024, Plaintiffs filed the present Motion to Remand, arguing that
26 Uponor’s removal is untimely under 28 U.S.C. § 1446(c), which prohibits removal based
27 on diversity jurisdiction more than one year after the action commenced unless the district
28 court finds that Plaintiffs acted in bad faith. (Mot. at 5.) Uponor asserts that Plaintiffs did,

1 in fact, act in bad faith, alleging that Danco “was not named as a Defendant in good faith
 2 or based upon Plaintiffs’ information and belief that the alleged leaks could have been the
 3 result of faulty installation.” (Resp. at 1.)

4 **II. LEGAL STANDARD**

5 Federal courts may exercise removal jurisdiction over a case only if subject matter
 6 jurisdiction exists. 28 U.S.C. § 1441(a); *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116
 7 (9th Cir. 2004). Federal courts have diversity jurisdiction over actions between citizens of
 8 different states where the amount in controversy exceeds \$75,000, exclusive of interest and
 9 costs. 28 U.S.C. § 1332(a). It is a “longstanding, near-canonical rule that the burden on
 10 removal rests with the removing defendant.” *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d
 11 676, 684 (9th Cir. 2006). Furthermore, “[courts] strictly construe the removal statute
 12 against removal jurisdiction.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *see*
 13 *also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941). When a defendant
 14 seeks to remove a case based on diversity jurisdiction more than one year after the action
 15 commenced, a court must find “that the plaintiff has acted in bad faith in order to prevent
 16 [the] defendant from removing the action.” 28 U.S.C. § 1446(c).

17 **III. ANALYSIS**

18 The parties do not dispute that there is complete diversity of citizenship, that the
 19 amount in controversy exceeds \$75,000, or that the removal of this action occurred more
 20 than one year after it commenced. Therefore, the Court must remand this case unless it
 21 finds that Plaintiff acted in bad faith by naming and later dismissing Danco.

22 The Ninth Circuit has offered little guidance for evaluating the bad faith exception
 23 under § 1446(c). However, “district courts in the Ninth Circuit have stated that ‘defendants
 24 face a high burden to demonstrate that a plaintiff acted in bad faith to prevent removal.’”
 25 *Kolova v. Allstate Ins. Co.*, 438 F. Supp. 3d 1192, 1196 (W.D. Wash. 2020) (quoting
 26 *Heacock v. Rolling Frito-Lay Sales, LP*, No. C16-0829JCC, 2016 WL 4009849, at *3
 27 (W.D. Wash. July 27, 2016)). Thus, “district courts apply a ‘strict standard’ and find ‘bad
 28 faith when a plaintiff fail[s] to actively litigate a claim against a defendant in any

1 capacity.” *Id.* (quoting *Heacock*, 2016 WL 4009849, at *3) (alteration in original); *see*
 2 *also Aguayo v. AMCO Ins. Co.*, 59 F. Supp. 3d 1225, 1277 (D.N.M. 2014) (requiring a
 3 defendant to show “strong, unambiguous evidence of the plaintiff’s subjective intent” or,
 4 alternatively, “that the plaintiff . . . engaged in a mere scintilla of litigation against the
 5 removal spoiler”).

6 In the Ninth Circuit, “courts often consider three factors when evaluating bad faith
 7 under 28 U.S.C. § 1446(c)(1): ‘[t]he timing of naming a non-diverse defendant, the timing
 8 of dismissal, and the explanation given for that dismissal.’” *Kolova*, 438 F. Supp. 3d
 9 at 1196–97 (quoting *Heacock*, 2016 WL 4009849, at *3) (alteration in original); *see also*
 10 *Kalfsbeek Charter v. FCA US, LLC*, 540 F. Supp. 3d 939, 943 (C.D. Cal. 2021) (“[C]ourts
 11 have considered the timing of naming and dismissing the non-diverse defendant, the
 12 explanation given for dismissal, and whether the plaintiff actively litigated the case in ‘any
 13 capacity’ against a non-diverse defendant before dismissal.” (quoting *Torres v. Honeywell,*
 14 *Inc.*, No. 2:20-CV-10879-RGK-KS, 2021 WL 259439, at *3 (C.D. Cal. Jan. 25, 2021))).

15 First, the timing of naming Danco does not clearly weigh for or against a finding of
 16 bad faith. Courts have held that a plaintiff did not act in bad faith by naming non-diverse
 17 defendants in the original complaint and serving them within forty-five days. *See Manious*
 18 *v. R.J. Reynolds Tobacco Co.*, 720 F. Supp. 3d 952, 960–61 (D. Haw. 2024). However, a
 19 plaintiff may act in bad faith by naming non-diverse defendants shortly after removal and
 20 failing to serve them within the one-year limitation period. *See Heller v. Am. States Ins.*
 21 *Co.*, No. CV 15-09771 DMG, 2016 WL 1170891, at *3 (C.D. Cal. Mar. 25, 2016).

22 Here, Plaintiffs did not name Danco in the initial complaint, but neither could they
 23 have been expected to. Defendant does not dispute that Plaintiffs first learned of Danco
 24 through mediation on September 22, 2023, notified the court of their intention to join
 25 Danco on October 19, 2023, and filed the SAC naming Danco on November 9, 2023, nearly
 26 six months after Defendants first removed the case from state court. Although Defendant
 27 stresses that “one and a half months” elapsed between the September mediation and the
 28 filing of the SAC, (Resp. at 5), such delay does not appear inherently unreasonable. Further,

1 Plaintiff promptly served Danco within one month of remanding the case to state court and
2 nearly one month before the one-year limitation period expired. Although Plaintiffs named
3 Danco almost ten months after commencing the action, this timing does not clearly suggest
4 that Danco was named simply to defeat diversity and run out the clock for future removal,
5 rather than in response to Plaintiffs' discovering Danco's identity and potential liability.

6 Second, the timing of Danco's dismissal does not support a finding of bad faith.
7 Courts are more likely to find a plaintiff acted in bad faith when dismissing the non-diverse
8 defendant shortly after the one-year limitation expires, *see NKD Diversified Enters., Inc.*
9 *v. First Mercury Ins. Co.*, No. 1:14-cv-00183-AWI-SAB, 2014 WL 1671659, at *4
10 (E.D. Cal. Apr. 28, 2014), rather than well after the limitation period lapses, *see Kolova*,
11 438 F. Supp. 3d at 1197 (noting that "nearly six months" had passed between the removal
12 deadline and the dismissal of the non-diverse defendants).

13 Here, Plaintiffs dismissed Danco on September 5, 2024, nearly nine months after
14 the one-year removal limitation had lapsed. Although it is possible that Plaintiffs simply
15 delayed this dismissal to bolster their later argument against removal, taken alone, this
16 timing clearly weighs against a finding of bad faith.

17 Lastly, Plaintiffs' explanations for naming and dismissing Danco do not suggest that
18 they named Danco simply to defeat diversity. A plaintiff's failure to actively litigate a case
19 against the non-diverse defendant could suggest that there was no valid reason for naming
20 and dismissing that defendant. *See Aguayo*, 59 F. Supp. 3d at 1263. However, a finding of
21 bad faith is not supported if a plaintiff had a "legitimate basis for believing it had a valid
22 claim" against the non-diverse defendant and "offered a reasonable explanation for
23 dismissing" the non-diverse defendant. *See Kalfsbeek Charter*, 540 F. Supp. 3d at 946.

24 Here, Plaintiffs allege to have believed they had valid claims against Danco for
25 negligence, negligent misrepresentation, and breaches of implied and express warranties.¹

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27 ¹ Whether Plaintiffs *in fact* had valid claims against Danco is not at issue.
28 Defendants do not argue that these claims were invalid, but rather that Plaintiffs asserted
the claims only to defeat diversity and keep the case in state court. (*See Resp. at 4.*) But
Plaintiffs cite authority suggesting they had a legitimate basis to believe they had valid
claims against a subcontractor for construction defects. (*See Reply at 7.*)

(Doc. 1, Ex. E at 8–16.) In his declaration dated October 10, 2024, one of Plaintiffs’ experts, J. Scott Friesen, noted that after he first inspected the plumbing system at the Apartments in August 2023, he “suspected that the mode of failure causing the multiple leaks . . . could either be defective Uponor PEX products, installation deficiencies by the plumber[,] or both.” (Mot., Ex. B ¶ 4.) Defendant argues that Plaintiffs could not “hold a good faith belief that installation of the PEX by Danco caused the alleged plumbing leaks” because “Plaintiffs’ experts rendered their opinions that the PEX was ‘defectively manufactured’ *before* the parties participated in mediation on September 22, 2023.” (Resp. at 5.) But these theories—defective manufacture and defective installation—are not mutually exclusive.² As Mr. Friesen noted in his declaration, he suspected at the time that both manufacture and installation could have contributed to the PEX failures, and his opinion is sufficient to support Plaintiffs’ reasonable belief.

Plaintiffs also offer a reasonable explanation for dismissing Danco: namely, that after ongoing inspection and informal discovery, Plaintiffs “determined that the claims against Danco were of minor significance compared to the claims against Uponor, proving the claims would add unnecessary cost and complexity to the case.” (Reply at 3.) In his declaration, Mr. Friesen noted that after continued inspection and review of “samples, documents[,] and reports . . . regarding the Uponor PEX pipe failures at the [Apartments] and throughout the country,” he is “now of the opinion that the mode of failure . . . is entirely a result of deficiency in the manufacturer [sic] and design of the Uponor PEX product.” (Mot., Ex. B ¶ 9.) Additionally, Plaintiffs learned through communications with Danco “that Danco’s installers were trained by Uponor in the use of its products,” suggesting that faulty installation was not a likely cause of the PEX failures. (Reply at 3.) Given their expert’s evolving opinion and information gathered from Danco’s counsel,

² Defendant appears to rely on the declaration of Plaintiffs’ other expert, Dr. Ahamed Shabeer, who seemingly did not share Mr. Friesen’s suspicion that defective installation may have also contributed to the PEX pipe leaks. (Mot., Ex. C at 2.) Although it is unclear from Dr. Shabeer’s declaration when he arrived at this conclusion, it is not inherently unreasonable for Plaintiffs to rely on one expert’s opinion over another.

1 Plaintiffs allegedly dismissed Danco to “maximiz[e] the Plaintiffs’ recovery and
2 minimize[e] the costs of litigation.” (Reply at 3.)

3 Defendant contends that Plaintiffs’ explanations for naming and dismissing Danco
4 are mere pretext because “in the 10 months between the filing of the SAC . . . and Plaintiffs’
5 voluntary dismissal of Danco,” Plaintiffs did not “take any action to compel a responsive
6 pleading from Danco” and “performed no discovery into any of the four (4) causes of action
7 they asserted against Danco.” (Resp. at 3–4.) Defendant thus argues that Plaintiffs failed
8 to “actively litigate” against Danco and acted in bad faith. This argument is unpersuasive,
9 as courts take an “expansive view of active litigation”:

10 [T]he plaintiff need not expect to recover damages from the removal-spoiling
11 defendant; if the plaintiff keeps the removal spoiler joined to obtain
12 discovery from him or her, to force a settlement, to pressure the removal
13 spoiler to testify on the plaintiff’s behalf against other defendants, or to
14 obtain a judgment against the removal spoiler that the plaintiff knows the
15 removal spoiler cannot pay, [courts] will consider the plaintiff to have
16 actively litigated against the removal spoiler, and unless the removing
defendant can adduce other evidence of bad faith, such as communications
from the plaintiff directly attesting to bad faith, [courts] will presume good
faith and remand the case.

17 *Aguayo*, 59 F. Supp. 3d at 1229. Even though Plaintiffs did not compel a responsive
18 pleading or conduct formal discovery against Danco during the six months between
19 Danco’s appearance and dismissal, the informal discovery communications with Danco’s
20 counsel were certainly more than the “mere scintilla of litigation” that would have indicated
21 bad faith.³ *See id.* at 1277; *see also Stroman v. State Farm Fire & Cas. Co.*, No. C18-1297
22 RAJ, 2019 WL 1760588, at *2 (W.D. Wash. Apr. 22, 2019) (seeking “additional
23 information . . . through indirect discovery” was indicative of “active litigation”).
24

25 ³ Plaintiffs also argue that Danco did not appear in the case until after “the deadline
26 to remove the case . . . had already passed, so whether Plaintiffs did or did not actively
27 litigate against Danco is irrelevant—it was already too late to remove the case.” (Reply
28 at 5.) But whether or not Plaintiffs actively litigated against Danco is, in fact, relevant, as
it might suggest whether Plaintiffs had some non-dilatory motive in naming and dismissing
Danco.

1 Indeed, an email from Plaintiffs' counsel dated March 14, 2024—nearly three
 2 months after the one-year limitation on removal had expired—shows that Plaintiffs were
 3 actively seeking to verify whether Danco had been certified and trained by Uponor to
 4 install its PEX products. (Reply, Ex. B at 1.) For the Court to find that Plaintiffs acted in
 5 bad faith, it would have to find that this email was a mere ruse intended to obfuscate
 6 Plaintiffs' true motivation to name Danco solely to defeat diversity jurisdiction. But
 7 Defendant has not proffered evidence—let alone “strong, unambiguous evidence”—
 8 suggesting such intent. *See Aguayo*, 59 F. Supp. 3d at 1277. Given Defendant's heavy
 9 burden to show bad faith, the Court cannot make such a finding on speculation alone.

10 Considering these factors together, the Court does not find that Plaintiffs acted in
 11 bad faith by naming and later dismissing Danco. Although the timing of naming Danco
 12 might support a finding of bad faith, the other factors weigh against this. The timing of
 13 Danco's dismissal long after the limitation period ended; Plaintiffs' valid claims against
 14 Danco; and Plaintiffs' reasonable explanation for dismissing Danco all suggest that
 15 Plaintiffs did not name a non-diverse defendant simply to prevent removal of this case.

16 **IV. CONCLUSION**

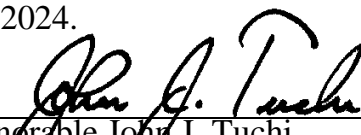
17 For the reasons set forth *supra*, the Court finds that Defendant has failed to show
 18 Plaintiffs acted in bad faith, and Defendant's removal is thus untimely under 28 U.S.C.
 19 § 1446(c).

20 **IT IS THEREFORE ORDERED** granting Plaintiffs' Motion to Remand. (Doc. 9).

21 **IT IS FURTHER ORDERED** directing the Clerk of Court to remand this matter
 22 to Maricopa County Superior Court without delay.

23 **IT IS FURTHER ORDERED** vacating the Rule 16 Scheduling Conference set for
 24 February 20, 2025 at 10 AM (Doc. 14).

25 Dated this 20th day of November, 2024.

26 
 27 Honorable John J. Tuchi
 28 United States District Judge